trust, to save his estate,[20] and, if he failed to do so, it could decree a reconveyance or cancelation.[21]

EVENTS SUBSEQUENT TO THE CONTRACT AS A DEFENCE TO SPECIFIC PERFORMANCE.—The broad principle that equity, in its discretion, will deny specific performance where to grant it would impose a hardship on the defendant, appears from a consideration of the cases to resolve itself into the narrower rule that the contract will not be enforced where there is inadequacy of consideration due to the mental inferiority of the defendant; the fraud or failure of the plaintiff to disclose facts peculiarly within his knowledge, when under a duty to do so; or events subsequent to the contract which have rendered it unequal.[1] The frequent statement that the only question is whether the contract was fair and reasonable at the time when made[2] applies where specific performance will carry out the contract as originally intended by the parties, but admittedly does not preclude a defence based on subsequent events not within the contemplation of the parties when the contract was made.[3] The decisions in which such a defence has been sustained appear to rest on one or both of the following grounds: first, the fact that specific performance would impose on the defendant a burden utterly disproportionate to the benefit secured to the plaintiff;[4] and secondly, that a literal enforcement of the contract would violate the real intent of the parties.[5] That the latter is the more important element is apparent from the fact that where both are present the court prefers to rest its decision on the intent of the parties,[6] sometimes adding by way of dictum that even if the subsequent events were in the contemplation of the parties, nevertheless the

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[20]Cornell *v.* Whitney (1903) 132 Mich. 300, 93 N. W. 614.

[21]Reid *v.* Burns (1861) 13 Ohio St. 49; Grant *v.* Bell, *supra*; Cornell *v.* Whitney, *supra*; Abbott *v.* Sanders, *supra*.

[1]9 Columbia Law Rev., 68.

[2]See Prospect Park & C. I. R. R. *v.* Coney Island & B. R. R. (1894) 144 N. Y. 152, 39 N. E. 17; Willard *v.* Tayloe (1869) 75 U. S. 557.

[3]Willard *v.* Tayloe, *supra*.

[4]City of London *v.* Nash (1747) 3 Atk. 512; Kimberley *v.* Jennings (1836) 6 Sim. 340; Clarke *v.* Rochester L. & N. F. R. R. (N. Y. 1854) 18 Barb. 350. The denial of relief is frequently influenced by other equities such as laches of the plaintiff, Town of Huntington *v.* Titus (N. Y. 1900) 50 App. Div. 468, 64 N. Y. Supp. 58, or the interest of the public. Conger *v.* New York W. S. & B. R. R. (1890) 120 N. Y. 29, 23 N. E. 983. An additional ground for denying specific performance where the benefit to the plaintiff is very slight is the obvious adequacy of legal damages.

[5]King *v.* Raab (1904) 123 Iowa 632, 99 N. W. 306; Ferguson *v.* Blackwell (1899) 8 Okla. 489, 58 Pac. 647. In the leading American case, Willard *v.* Tayloe, *supra*, the contract provided for payment in "cash". Prior to the time for performance Congress declared government notes "legal tender". The court held that although government notes were "cash" at the time of the tender, the parties meant gold, and the plaintiff must pay him gold.

[6]Chicago & A. R. R. *v.* Schoeneman (1878) 90 Ill. 258; Trustees *v.* Thacher (1882) 87 N. Y. 311.

hardship to the defendant would be a defence.[7] The same test is applied in the analogous question of mutual mistake, where the expressed intent of the parties will not be enforced because it is contrary to their real intent.[8] The same considerations govern the converse of this situation, for in contracts of a speculative nature, such as mining leases, where a subsequent change in values was probably contemplated by the parties, the contract will generally be enforced,[9] be the hardship to the defendant ever so great, because the parties intended to cover such a contingency.[10]

These principles might well have been applied in the recent case of *Humpfner* v. *Beers* (App. Div., 1st Dept. 1916) 157 N. Y. Supp. 345. A tenant brought a bill for specific performance of an option to renew contained in a twenty-one year lease providing for a renewal upon the same terms and conditions as the original lease. Subsequent to his election to renew, the landlord, also owner of adjoining premises, discovered a hidden drain running from the leased premises under the adjoining lot to the street. Fearing that a renewal lease of the premises "with the appurtenances" would create an easement in view of his present knowledge of the drain, he refused to execute the lease except upon the insertion therein of a provision to the effect that the making of the lease should not create any easement unless such easement legally existed prior to the renewal. The court held for the landlord. Here, due to subsequent events, namely, the discovery of the drain, which could not possibly have been contemplated when the contract was made, the exact wording of the contract fails to express the true intent of the parties.[11] It might also be urged that a literal enforcement of the contract would work a forfeiture,[12] and as the defendant was a trustee, there was also present the equity of the *cestui*, which should be protected.[13] The court was therefore fully

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[7]Chambers *v.* Livermore (1867) 15 Mich. 381; Kelley *v.* York etc. Co. (1900) 94 Me. 374, 47 Atl. 898; Waite *v.* O'Neil (C. C. 1896) 72 Fed. 348.

[8]Reid *v.* Slocum (1904) 34 Wash. 173, 75 Pac. 629; Hatch *v.* Kizer (1892) 140 Ill. 583, 30 N. E. 605. Specific performance may be decreed if the plaintiff agrees to abatement of the price, in case of a deficiency, Leigh *v.* Crump (1840) 36 N. C. 299, or compensation, in case of a surplus. King *v.* Hamilton (1830) 29 U. S. 311. A unilateral mistake on the part of the defendant may be a defence if due to the plaintiff. Chute *v.* Quincy (1892) 156 Mass. 189, 30 N. E. 550.

[9]Haywood *v.* Cope (1858) 25 Beav. 140; Bradley *v.* Heyward (C. C. 1908) 164 Fed. 107; 9 Columbia Law Rev., 68.

[10]Franklin Tel. Co. *v.* Harrison (1892) 145 U. S. 459, 472, 473, 12 Sup. Ct. 900. In this, as in many of the later cases, the court does not recognize hardship as a possible consequence of foreseen circumstances, thus leaving the sole test one of intention.

[11]Willard *v.* Tayloe, *supra*; Waite *v.* O'Neil, *supra*. Specific performance in the principal case would give the plaintiff property which it was not intended he should have, and without compensation to the defendant. Gotthelf *v.* Stranahan (1893) 138 N. Y. 345, 34 N. E. 286.

[12]This, of course, is not a forfeiture provided for by a term of the contract, but one resulting indirectly from its enforcement. Peacock *v.* Penson (1848) 11 Beav. 355. It is no defence where brought about by the default of the defendant. Helling *v.* Lumley (1858) 3 De G. & J. 493.

[13]See Harnett *v.* Yielding (1805) 2 Sch. & Lef. *549; Tamm *v.* Lavalle (1879) 92 Ill. 263.

justified in refusing to enforce what in substance, though not in terms, is now really a different contract from that which the defendant made.[14]

SALE OR RESERVATION OF STANDING TIMBER.—When standing timber is sold or reserved as separate from the land,[1] the contract or deed is usually absolute in its terms, but contains a stipulation that the vendee or grantor, as the case may be, must remove the wood within a certain time. In a minority of cases no mention is made of a time limit. In construing the latter class of instruments, the courts generally apply the rule that the timber must be removed within a reasonable time. It cannot be doubted that such a construction is proper in those jurisdictions where the title does not pass until an actual severance has taken place, since the contract is then an executory one for the sale of personal property.[2] But where title to the timber passes immediately, which is the usual effect of such deed or contract, it should be noticed that this rule is most often applied when it may be fairly inferred from surrounding circumstances or from the situation of the parties that a reasonable time only was intended, or when there is evidence of a parol agreement to that effect.[3] There are, however, authorities to support its enunciation as a broad rule of law, which read into the instrument the stipulation of a reasonable time, though there is nothing to show that such was the intention of the parties.[4] Though this rule may be recognized, it is possible, of course, to convey or reserve an indefeasible title by the use of

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[14]See Baxendale *v.* Seale (1855) 19 Beav. 601. A lease providing for renewal upon "the same covenants and conditions" was held not to entitle the lessee to a renewal clause in the new lease. Muhlenbrinck *v.* Pooler (N. Y. 1886) 40 Hun 526. The principal case is a proper one for partial performance, King *v.* Hamilton, *supra*, by an execution of the lease including the protecting clause, but the question of compensation would depend on a determination of the legal existence of the easement.

[1]Whether it is a sale or a reservation, the same principles are involved and the same rules should be applied. See Adkins *v.* Huff (1906) 58 W. Va. 645, 52 S. E. 773; Huron Land Co. *v.* Davison (1902) 131 Mich. 86, 90 N. W. 1034; but see Mining Co. *v.* Cotton Mills (1906) 143 N. C. 307, 55 S. E. 700.

[2]See Fletcher *v.* Livingston (1891) 153 Mass. 388, 26 N. E. 1001; Butterfield Lumber Co. *v.* Guy (1908) 92 Miss. 361, 46 So. 78. It is possible, however, to convey timber as an interest in the land in Massachusetts, White *v.* Foster (1869) 102 Mass. 375, though contracts for the sale of timber are not generally so regarded, especially when they are oral and would therefore be invalid by the Statute of Frauds. See 15 Columbia Law Rev., 465.

[3]Hicks *v.* Phillips (1912) 146 Ky. 305, 142 S. W. 394; Patterson *v.* Graham (1894) 164 Pa. 234, 30 Atl. 247; McNair etc. Co. *v.* Adams (1907) 54 Fla. 550, 45 So. 492; but see Ferguson *v.* Arthur (1901) 128 Mich. 297, 87 N. W. 259.

[4]McNair etc. Co. *v.* Parker (1912) 64 Fla. 371, 59 So. 959; Fletcher *v.* Lyon (1909) 93 Ark. 5, 123 S. W. 801; Decker *v.* Hunt (N. Y. 1906) 111 App. Div. 821, 98 N. Y. Supp. 174; McRae *v.* Stillwell (1900) 111 Ga. 65, 36 S. E. 604.